2000

The State of Utah v. Leo James Suit and Willard Clark Hastings : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LEO JAMES SUIT and WILLARD CLARK HASTINGS,

Defendants-Appellants.

Case No. 13833

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE HONORABLE J. HARLAN BURNS, JUDGE, PRESIDING.

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Appellants In Pro Se

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for burglary rendered in the District Court of the Fifth Judicial District, in and for Washington County, State of Utah, the Honorable J. Harlan Burns, Judge, presiding.

DISPOSITION OF THE LOWER COURT

Appellants were charged with the crime of burglary and were bound over for trial in the district court. A jury

found them guilty and sentenced appellants to an indeterminate term as prescribed by law. It is from that conviction that this appeal arises.

RELIEF SOUGHT ON APPEAL

Respondent seeks that the verdict of the lower court be sustained.

STATEMENT OF THE FACTS

On the 8th day of March, 1974, a complaint was filed against Clark Hastings and Leo James Suit, charging them with committing the crime of burglary, a third degree felony in violation of Utah Code Ann. § 76-6-202 (1953), as amended. A preliminary hearing was held on April 18, 1974, and appellants were bound over for trial in the district court. An information was properly filed and the case went to trial on May 22, 1974, before the Honorable J. Harlan Burns, sitting with a jury. Upon the following facts, the jury returned a verdict of guilty:

On January 17, 1974, at approximately 1:00 o'clock a.m., Clark Hastings, Leo James Suit and Daniel Wilbur broke into a local hardwood and furniture store and removed several

items of inventory. Entry was accomplished by breaking out the glass window in the back door of the building. Appellants carried the stolen articles from the premises, placed them in their vehicle and fled the scene. All of the actions of appellants were part of a pre-conceived scheme to "hit" the store. The stolen properly was then transported to Las Vegas, Nevada, where it was subsequently discovered pursuant to a valid search warrant.

ARGUMENT

POINT I

THE JURISDICTION OF THE DISTRICT COURT WAS PROPERLY INVOKED AS TO THE THIRD DEGREE FELONY BURGLARY CHARGE.

Appellants contend the District Court proceeded without jurisdiction in the instant case. They claim that the complaint and the information charging them with the crime of burglary were fatally defective in that they failed to allege "intent," a requisite to criminal conduct, Utah Code Ann. 76-2-101 (1953), as amended. It is a correct statement of the law that all essential elements of the crime being charged must be alleged in the complaint and information. The crime of burglary, Utah Code Ann. § 76-6-202 (1953), as amended, is defined:

> "A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault of any person."

The requisite elements are (1) unlawfully entering or remaining; (2) in a building; (3) with intent to (a) commit a felony, (b) commit a theft, or (c) commit an assault.

The complaint reads as follows:

> "Clark Hastings, Leo James Suit and Daniel Wilbur on or about the 17th day of January A.D. 1974, at Hurricane, Utah, Washington County, State of Utah, did commit a 3rd degree felony as follows, to wit: Burglary, committed as follows: that they did then and there enter or remain unlawfully in the Graff Mercantile building <u>with intent to commit theft</u> in violation of 76-6-202 UCA 1953 as amended."

The information reads similarly:

> "Burglary committed as follows: That said Willard Clark Hastings and Leo James Suit on or about the 17th day of Jan.,1974 at Hurricane, Wash. County, State of Utah, did enter or remain unlawfully in the Graff Furniture and Hardware Building <u>with intent to commit theft</u> in violation of Section 76-6-202 UCA 1953, as amended."

It is apparent that both the complaint and the information specifically allege "intent to commit theft" as an

element of the crime. There is no fatal defect as appellants contend. There is no defect at all. The jurisdiction of the district court to hear the third degree felony charge was therefore properly invoked according to the procedures provided by law.

POINT II

THERE WAS SUFFICIENT EVIDENCE TO CORROBORATE THE TESTIMONY OF AN ACCOMPLICE TO THE CRIME.

Utah Code Ann. § 77-31-18 (1953), as amended, reads:

> "A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof."

Appellants allege that the testimony of their accomplice, Daniel Wilbur, who was granted immunity in exchange for his testimony, was uncorroborated by other evidence and that their conviction cannot therefore stand. Were there in actuality no other evidence, Utah law would dictate a reversal. However, such is not the case. Sufficient corroborating evidence was presented to the court aside from the testimony

of appellants' partner in crime. In State v. Erwin, 101 Utah 365, 120 P.2d 285 at 299 (1941), Mr. Justice Wade stated:

> "This court has held that corroboration need not go to all the material facts testified to by the accomplice; that the corrobortive evidence need not be sufficient in itself to support a conviction; it may be slight and entitled to little consideration . . . the corroborating evidence must implicate the defendant in the offense and be inconsistent with his innocence, and must do more than cast a grave suspicion on him, and all this must be without the aid of testimony of the accomplice."

See also State v. Simpson, 120 Utah 596, 236 P.2d 1077 (1951); State v. Stewart, 57 Utah 224, 193 Pac. 855 (1920); People v. Lee, 2 Utah 441 (1889); State v. Spencer, 15 Utah 149, 49 Pac. 302 (1897); and State v. Brunner, 106 Utah 49, 145 P.2d 302 (1944).

The evidence must be viewed independently of Daniel Wilbur's testimony. It must connect appellants to the commission of the offense, but need not be sufficient to support a conviction. A look at the evidence offered at trial clearly shows that Mr. Wilbur's testimony did not alone convict appellants.

(1) Several guns were confiscated, pursuant to a search warrant, from the Las Vegas home of Roy Suit, brother of James Leo Suit, appellant (T.226-228). (2) The make, caliber and serial numbers of these firearms were identical to those stolen from Graffs on January 17, 1974 (T.95-109, 226-228). This evidence goes to corroborate Mr. Wilbur's account and to connect defendants with the offense. (3) Testimony was given by a Mr. Foster to the effect that in the early morning of January 17, 1974, between 12:00 o'clock midnight and 2:00 o'clock a.m., Clark Hastings and Leo Suit appeared at his home. Hastings asked for lodging and for money (T.197). (4) Suit gave Mr. Foster a Brown 243 rifle which Hastings described as "hot" (T.198,202). (5) Suit then left Foster's residence (T.202). (6) Foster later returned the rifle to Suit, and that same rifle was found by the police wrapped in green plastic and buried in the desert outside Hurricane (T.204). (7) Mrs. Isom, Leo Suit's mother-in-law, testified that her son-in-law received a telephone call on March 6, 1974, from his brother in Las Vegas (T.240), the same day the search warrant was executed and the

guns confiscated from the brother's home. (8) Suit borrowed Mrs. Isom's car and he and Clark Hastings carried from the house an object, described as a rifle, wrapped in green plastic. They also had with them a shovel (T.242-243). (9) Clayton Stratton testified that he saw one of the appellants parked in a car on a back road outside of Hurricane on the 6th day of March, 1974. He later led the police to that spot (T.257-258). (10) The police testified they followed tracks from the road to a cedar tree and dug up a green plastic bag containing a Brown 243 (T.265-266). There is ample evidence, provided in the record, on which to draw a connection between the appellants and the crime. This evidence need not support a conviction, nor go to support all the material facts testified to by the accomplice. It need only establish a connection between appellants and the crime and be inconsistent with their innocence to be considered corroborative. The jury was properly instructed on testimony of an accomplice and the need for corroborating evidence in Instructions Nos. 14 and 18. The requirements of Utah Code Ann. § 77-31-18 (1953), as amended, were therefore met.

POINT III

NO REVERSIBLE ERROR WAS COMMITTED BY THE TRIAL COURT IN INSTRUCTING THE JURY OR ADMITTING EVIDENCE.

Appellants contend that the trial court erred in admitting evidence relating to "theft" and "stolen property" and in instructing the jury regarding that evidence. The evidence admitted consisted of the rifles confiscated from the Las Vegas home of appellant Suit's brother, and the Brown 243 unearthed by the Hurricane police. These articles were admitted in order to establish a connection between appellants and the commission of the crime of burglary, not to establish guilt of "theft" or "possession of stolen property" or any other crime. The jury was properly instructed on these matters by the court in jury instruction No. 16. The evidence was offered to corroborate the testimony of Mr. Wilbur as required by Utah Code Ann. § 77-31-18 (1953), as amended. This evidence was a product of a valid search and seizure, pursuant to a warrant and was relevant and material. It was not error to admit it.

Appellants also claim that the Court erred in giving instruction No. 17, which reads:

"You are instructed that possession of property recently stolen when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property."

This instruction is taken from Utah Code Ann. § 76-6-402 (1953), as amended. In State v. Kirkman, 20 Utah 2d 44, 432 P.2d 638 (1967), speaking of an almost identical statute repealed and reenacted in 1973, the Court said:

"This statute has nothing to do with burglary and applies only to charges of stealing. However, one who has possession of recently stolen property would be faced with the situation of having adverse inferences drawn against him, and such inferences together with all the other evidence might be enough to convince a jury beyond a reasonable doubt that the defendant was guilty of larceny even in the absence of the statute above quoted.

"(3) The same adverse inference will confront a defendant in a burglary case where he has possession of recently stolen property which could have been obtained only by a burglarious entry into a building. There would be a duty upon the one in possession of such property to explain his possession if he is to remove that adverse inference against him pointing toward his guilt; and if he gives a false account of how he acquired that possession, or having a reasonable opportunity to show that

> his possession was honestly acquired he refuses or fails to do so, such conduct is a circumstance which may be considered by the jury along with all other evidence bearing upon the case in determining guilt or innocence.
>
> "This court has heretofore had occasion to deal with this problem. In the case of State v. Thomas, 121 Utah 639, 244 P.2d 653, it was said:
>
> > 'We recognize the correctness of the defendant's assertion that mere possession of recently stolen property, if not coupled with other inculpatory or incriminating circumstances, would not justify submission of the case to the jury and would not be sufficient to support a conviction. State v. Kinsey, 77 Utah 348, 295 P. 247, and cases therein cited; State v. Nichols, 106 Utah 104, 145 P.2d 802. Conversely, however, possession of articles recently stolen, when coupled with circumstances inconsistent with innocence, such as hiding or concealing them, or of making a false or improbable or unsatisfactory explanation of the possession, may be sufficient to connect the possessor with the offense of burglary and justify his conviction of it.'"

Although the instruction given was not properly applicable to the crime of burglary, not every error on the part of the court is grounds for reversal. According to Utah Code Ann. § 77-53-2 (1953), as amended, an error is reversible

only if the defendant is actually prejudiced by the error in respect to a substantial right. It is clear that the Court in Kirkman viewed possession of stolen property, taken from a burglarized building, to raise a strong inference of guilt, if not adequately explained. This inference, coupled with all the other evidence offered at trial, could certainly support a conviction, without Instruction No. 16. The conviction should not therefore be reversed. The effect of that instruction has not been shown to have substantially prejudiced appellants.

Appellants admit in their complaint that no specific exception was made to the challenged instruction until motion for a new trial. General exceptions are insufficient to raise questions on appeal. State v. King, 24 Utah 482, 68 Pac. 418 (1902). Appellants must specifically except to jury instructions, Utah Code Ann. § 77-37-2 (1953), as amended, in order for the lower court to first rule. As no such exceptions were taken they cannot now be raised.

CONCLUSION

Respondent respectfully seeks affirmance of the conviction in the lower court on the grounds that (1) the complaint and information complied in every respect with the requirements of the law and the jurisdiction of the district court was properly invoked; (2) there was sufficient evidence before the court to corroborate the testimony of the accomplice; and (3) no prejudicial error was committed by the trial court warranting reversal.

Respectfully submitted,

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